Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

From: Carla Wardlow, Chief, Technical Assistance Division
Galena West, Counsel, Legal Division
Luisa Menchaca, General Counsel

Date: January 30, 2004

Subject: Pre-notice Discussion of Amendments to Lobbying Disclosure Regulation 18616—Reporting by Lobbyist Employers and Persons Spending $5,000 or More to Influence Legislative or Administrative Action

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Executive Summary

The Political Reform Act (the "Act")[1] requires disclosure by lobbyist employers of payments made to lobbyists and lobbying firms to influence the legislative and administrative actions of the State Legislature and state administrative agencies. Persons who do not employ a lobbyist or a lobbying firm but make certain lobbying payments totaling $5,000 or more in a calendar quarter ("$5,000 filers") are also subject to disclosure. Lobbyist employers and $5,000 filers must disclose payments for overhead, compensation paid to non-lobbyists, and "grass roots" lobbying under a very broad category of disclosure called "other payments to influence legislative or administrative action." (Section 86116(h); regulation 18616.)

Section 86116 specifies the content of lobbyist employer and $5,000 filer disclosure reports. In 2001, it was amended by AB 1325 to include a limited reporting provision for payments to attorneys and witnesses for time spent appearing as counsel or testifying in Public Utilities Commission ("PUC") proceedings and for related preparation time. The amendment was meant to codify the existing FPPC regulations that exempt entities who lobby the PUC in certain circumstances. Upon further review, read literally, the current statute may be read to limit reporting in all PUC ratemaking and quasi-legislative proceedings to only attorney and witness expenses and by omission, require no reporting of any other attempts to influence PUC ratemaking and quasi-legislative proceedings, resulting in less reporting from entities that lobby the PUC than the regulations it purported to codify.

[1] Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

In addition, the new changes to section 86116(h) have raised questions about whether all PUC "grass roots" lobbying is exempt from the reporting requirements of section 86116. "Grass roots" lobbying is a qualifying factor to determine that a person is a $5,000 filer. According to section 86115, a $5,000 filer would have a duty to file lobbying reports even if that filer qualifies because of PUC "grass roots" activity alone. However, the amendment to section 86116 created subdivision (h)(2) which, on its face, removes most "payments to influence a ratemaking or quasi-legislative proceeding before the Public Utilities Commission" from reporting leaving only attorney and witness costs associated with PUC proceedings. "Grass roots" lobbying of the PUC would drop out and no reporting would be required under this literal reading of the statute. Therefore, while the PUC "grass roots" $5,000 filers would have a duty to file under section 86115(b), they would have no information to include in their report, pursuant to the amendment to section 86116(h)(2). This would result in an unintended amendment to section 86115 because there would be no payment to count to establish that a person qualifies as a $5,000 filer.

In order to give meaning to both sections, staff believes that section 86115 must be read to continue to count "grass roots" lobbying of the PUC to qualify $5,000 filers under the criteria stated, thereby create a filing obligation for those filers. Also, section 86116 must be read to require at least *some* "grass roots" lobbyist reporting from those filers. The proposed amendments to regulation 18616 would clarify this requirement for both $5,000 filers and lobbyist employers. Staff recommends adoption of the proposed amendments.

Background

The Act requires disclosure of payments made to influence the actions of the State Legislature and state administrative agencies. Individuals who qualify as "lobbyists" and entities that qualify as "lobbying firms" under the Act, as well as their employers and clients ("lobbyist employers"), must register and file quarterly reports disclosing these payments. (Section 86100 et seq.) Persons who do not employ a lobbyist or a lobbying firm but make certain lobbying payments totaling $5,000 or more in a calendar quarter also must disclose their payments ("$5,000 filers"). (See sections 82038.5, 82039, 82039.5 and 86115.)

Lobbying filers represent many interest groups, including local government, business entities, trade and professional associations, labor unions, charitable and social organizations. Quarterly disclosure reports of lobbyist employers and $5,000 filers must include the following information: legislative bills or administrative matters lobbied, payments made to lobbyists and lobbying firms,[2] gifts and other benefits provided to legislative or agency officials, and campaign contributions. Lobbyist employers and $5,000 filers also must disclose "other payments to influence legislative or administrative action." (Section 86116(h); regulation 18616.) This is a very broad category of disclosure that includes overhead, compensation paid to non-lobbyists, and other expenses related to the employer's lobbying activities, including payments "for or in

[2] The difference is that $5,000 filers do not make payments to lobbyists or lobbying firms.

connection with soliciting or urging other persons to enter into direct communication with any elective state official, legislative official or agency official" (i.e., grass roots lobbying). (Section 82045(e); regulation 18616(a)(4)(C).)

To qualify as a lobbyist under the Act, an individual must meet either the $2,000 threshold or the "principal duties" test. (Section 82039.)[3] Regulation 18239 specifies how the $2,000 threshold and "principal duties" test are to be applied to determine when an individual qualifies as a lobbyist (which also determines when the individual's employer or client qualifies as a lobbyist employer). The regulation also contains an exception to the lobbyist definition for certain appearances before state agencies. The regulation provides that individuals need not count time spent engaging in "administrative testimony" for purposes of determining whether they qualify as lobbyists.

The administrative testimony exception was first adopted by the Commission in 1975 and means, generally, testimony given before a state administrative agency in a publicly noticed and recorded hearing to which full public access is provided. (See regulation 18239(d)(1)(A).) Although administrative testimony will not qualify an individual as a lobbyist under the Act, payments for administrative testimony are reportable by lobbyist employers (e.g., an entity that employs a lobbyist for other types of lobbying activities, such as attempting to influence the Legislature) as well as by $5,000 filers. The $5,000 filer reports these payments as "other payments to influence legislative or administrative action."

Over the years, several attempts have been made to clarify, simplify, or reduce reporting of payments in connection with activities before the PUC.[4] In the 1980's, representatives from the PUC and utility companies expressed concern that the Act's reporting requirements related to PUC ratemaking proceedings were over broad, resulting in a misleading image that the utilities were expending huge sums on lobbying activities when, in fact, their participation in PUC proceedings was mandatory, rather than voluntary. For example, at that time, the utilities were required to include as "other payments" hundreds of hours of employee time spent compiling data and statistics in connection with rate applications and other ratemaking proceedings.

In 1986, this Commission adopted regulation 18616 which, among other things, reduced reporting in connection with "administrative testimony in ratemaking proceedings before the PUC." The regulation limited the reporting requirement to payments to attorneys for time spent appearing as counsel and payments to witnesses for time spent testifying in the proceedings.

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[3] Section 82039 defines the term "lobbyist," in relevant part, as follows: "(a) 'Lobbyist' means any individual who receives two thousand dollars ($2,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or whose principal duties as an employee are, to communicate directly or through his or her agents with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action. An individual is not a lobbyist by reason of activities described in Section 86300…."

[4] The PUC is a state administrative agency and attempts to influence the PUC are attempts to influence "administrative action" as defined in the Act.

In 1990, Pacific Telesis Group petitioned the Commission to further expand the reporting exception to include other types of regulatory proceedings conducted by the PUC that were ancillary to ratemaking and to other quasi-legislative proceedings which did not meet the definition of "administrative testimony" contained in regulation 18239. After several hearings, the regulation was amended in 1993 to include in the definition of administrative testimony "an application, complaint, investigation, rulemaking, alternative dispute resolution procedures in lieu of formal proceedings as may be sponsored or endorsed by the California Public Utilities Commission, or other formal proceeding before the California Public Utilities Commission." (Regulation 18239(d)(1)(B) and (C).) At the same time, regulation 18616 was amended to remove references to "ratemaking proceedings" and apply the reporting exception to the broader range of activities covered under the new definition of administrative testimony.

AB 1325 (Chapter 921, Stats. 2001)

As originally introduced in February 2001, the purpose of AB 1325 was to overturn the reduced reporting provisions contained in regulations 18239 and 18616. (Assembly Committee on Elections, Reapportionment and Constitutional Amendments Analysis, April 17, 2001.) However, as chaptered, it essentially codified the exceptions established in the regulations--the only apparent difference being that payments for time spent by attorneys and witnesses preparing to appear or testify before the PUC were again included in the amounts that must be reported.

The legislation added new subdivisions to the definitions of "administrative action" and "lobbyist" in sections 82002 and 82039, specifically addressing PUC proceedings. Effective January 1, 2002, the definition of "administrative action" in section 82002 was amended to add subdivisions (b) and (c) defining "ratemaking proceeding" and "quasi-legislative proceeding" for purposes of proceedings before the PUC. Section 82002 now reads:

> "(a) 'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.
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> "(b) 'Ratemaking proceeding' means, for the purposes of a proceeding before the Public Utilities Commission, any proceeding in which it is reasonably foreseeable that a rate will be established, including, but not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms.
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> "(c) 'Quasi-legislative proceeding' means, for purposes of a proceeding before the Public Utilities Commission, any proceeding that involves consideration of the establishment of a policy that

> will apply generally to a group or class of persons including, but not limited to, rulemakings and investigations that may establish rules affecting an entire industry."

AB 1325 also added a new subdivision (b) to section 82039, defining "lobbyist:"

> "(b) For the purposes of subdivision (a), a proceeding before the Public Utilities Commission constitutes 'administrative action' if it meets any of the definitions set forth in subdivision (b) or (c) of Section 82002. However, a communication made for the purpose of influencing this type of Public Utilities Commission proceeding is not within subdivision (a) if the communication is made at a public hearing, public workshop or other public forum that is part of the proceeding, or if the communication is included in the official record of the proceeding."

Section 86116, which specifies the content of lobbyist employer and $5,000 filers disclosure reports, was amended to include the limited reporting provision for payments to attorneys and witnesses for time spent appearing as counsel or testifying in PUC proceedings and for related preparation time.

> "(h) (1) Except as set forth in paragraph (2), the total of all other payments to influence legislative or administrative action including overhead expenses and all payments to employees who spend 10 percent or more of their compensated time in any one month in activities related to influencing legislative or administrative action.
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> "(2) A filer that makes payments to influence a ratemaking or quasi-legislative proceeding before the Public Utilities Commission, as defined in subdivision (b) or (c), respectively, of Section 82002, may, in lieu of reporting those payments pursuant to paragraph (1), report only the portion of those payments made to or for the filer's attorneys for time spent appearing as counsel and preparing to appear as counsel, or to or for the filer's witnesses for time spent testifying and preparing to testify, in this type of Public Utilities Commission proceeding. This alternative reporting of these payments made during a calendar month is not required to include payments made to an attorney or witness who is an employee of the filer if less than 10 percent of his or her compensated time in that month was spent in appearing, testifying, or preparing to appear or testify before the Public Utilities Commission in a ratemaking or quasi-legislative proceeding. For the purposes of this paragraph, time spent preparing to appear or preparing to testify does not include time spent preparing written testimony."

As a result of these changes, the Commission amended regulations 18239, 18615, and 18616 in 2002 to bring them into conformity with the statute.

"Grass Roots" Lobbying

As noted above, included in the Act's lobbying provisions is the requirement to disclose payments for "grass roots" lobbying. "Grass roots" lobbying specifically includes the following at section 82045:

> "'Payment to influence legislative or administrative action' means any of the following types of payments:
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> "(e) Payment for or in connection with soliciting or urging other persons to enter into direct communication with any elective state official, legislative official or agency official."

In addition to reporting requirements, grass roots lobbying can qualify a person as a $5,000 filer. (Section 86115.) Five thousand dollar filers qualify as such under section 86115(b) when directly or indirectly making payments to influence legislative or administrative action unless all of the payments are activity expenses.[5] In fact, section 86115(b) cross-references to section 82045(c), specifically excluding activity expenses as a basis for qualification as a $5,000 filer. Section 82045 also contains the definition of "grass roots" lobbying in subdivision (e), which was not excluded along with activity expenses as a means for qualification as a $5,000 filer. This express exception outlines the one occasion provided by the statute when a person engaged in influencing legislative or administrative action will not qualify as a $5,000 filer and, therefore, has no filing obligations under section 86116. All others who qualify as $5,000 filers under the statute must file a statement as required by section 86116, including those who qualify based on "grass roots" lobbying alone.

[5] "Activity expenses," as used in section 82045 and defined in section 86111, are "any expense incurred or payment made by a lobbyist, lobbying firm, lobbyist employer or a person described in subdivision (b) of Section 86115, or arranged by a lobbyist or lobbying firm, which benefits in whole or in part any elective state official, legislative official, agency official, state candidate, or a member of the immediate family of one of these individuals" and includes gifts and honoraria.

Legislative Intent

As stated earlier, section 86116 specifies the content of lobbyist employer and $5,000 filer disclosure reports, and was amended by AB 1325 to include a limited reporting provision for payments to attorneys and witnesses for time spent appearing as counsel or testifying in PUC proceedings and for related preparation time. The amendment, as discussed in committee analyses, was meant to codify the existing FPPC regulations that exempt entities who lobby the PUC in certain circumstances. (Senate Committee on Elections and Reapportionment Analysis, July 11, 2001.) The FPPC regulations at that time[6] reduced the reporting of activities before the PUC that were described in regulation 18239(d)(1) as "administrative testimony," defined "as acting as counsel in, appearing as a witness in, or providing written submissions, including answers to inquiries, which become part of the record…" in specific proceedings conducted by the PUC. The current statute, on its face, limits reporting in all PUC ratemaking and quasi-legislative proceedings as defined in section 82002 to only attorney and witness expenses and by omission, requires no reporting of any other attempts to influence PUC ratemaking and quasi-legislative proceedings, resulting in less reporting from entities that lobby the PUC than the regulations it purported to codify.

After AB 1325 was introduced as a means to abolish the preferential treatment of proceedings before the PUC, it was transformed into a bill to codify the regulations granting reduced reporting for those same proceedings. (Assembly Committee on Elections, Reapportionment and Constitutional Amendments Analysis, April 17, 2001, and Senate Committee on Elections and Reapportionment Analysis, July 11, 2001.) In its final version, the bill was purported to allow lobbyist employers and $5,000 filers, in lieu of reporting payments for "overhead expenses and payments to employees who spend 10 percent or more in lobbying activities in any one month," to report only those "payments to influence a ratemaking or quasi-legislative proceeding before the CPUC." (Senate Rules Committee Analysis, August 21, 2001.) Although the legislative history is unclear regarding whether the Legislature intended to include or exclude "grass roots" lobbying from the reporting requirements of section 86116, it is clear that the use of "grass roots" lobbying as a qualifying factor to determine that a person is a $5,000 filer remains unchanged. Additionally, AB 1325 amended the definition of lobbyist in section 82039 to specifically exclude communications made at public proceedings before the PUC, but made no mention of the communications preceding the public hearing, workshop or forum to address "grass roots" lobbying.

Statutory Interpretation

Sections 86115 and 86116 are inconsistent through their applications. A well-settled rule of statutory interpretation is that the Legislature is presumed to know of other laws in existence at the time and is not presumed to repeal a preexisting law by implication. (*Consumers Union of United States Inc., et al v. California Milk Producers Advisory*

[6] Regulation 18239(d)(1) appeared as the March 15, 1994, version of the regulation at the time of the legislation.

Board (1978) 82 Cal.App.3d 433, 445-446.) To overcome this presumption, "the two acts must be irreconcilable, clearly repugnant, and so inconsistent as to prevent their concurrent operation." (*Warne v. Harkness* (1963) 60 Cal.2d 579, 588, as quoted in *Consumers Union of United States, supra*.) According to section 86115, a $5,000 filer would have a duty to file even if that filer qualifies because of PUC "grass roots" activity alone. Under section 86116(h)(1), "grass roots" lobbying in general would be reported as a total amount spent. However, the amendment to section 86116 created subdivision (h)(2) which, on its face, removes all "payments to influence a ratemaking or quasi-legislative proceeding before the Public Utilities Commission" from this lump sum reporting and makes only those payments to influence which have incurred attorney or witness time reportable. "Grass roots" lobbying of the PUC would drop out and no reporting would be required under this literal reading of the statute. In other words, while the PUC "grass roots" $5,000 filers have a duty to file under section 86115(b), they would have no information to include in their report, according to section 86116(h)(2). Therefore, they would not qualify as a "filer."

AB 1325 amended section 86116 (what must be reported), not section 86115 (who is obligated to report). If section 86116 is read to mean that only attorney and witness costs count as payments to influence PUC proceedings, then it is essentially reading the filing requirement for those who qualify as $5,000 filers under section 86115(b) because of grass roots efforts regarding the PUC out of existence since they would have no duty to disclose their payments. The Act cannot be amended through implication. Section 81012 contains specific compliance procedures to amend or repeal sections of the Act. Section 81012 also allows only amendments to further the purposes of the Act. In construing statutory language, consideration must be given to the language in context of the entire statute and the statutory scheme of which it is a part. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. (*Dubois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388.) An implied amendment which makes a requirement of the Act null and void does not further the purposes of the Act nor does it harmonize with the statutory framework as a whole.

As stated previously, section 86115(b) contains an express exception for when a person will not qualify as a $5,000 filer. The statutory construction doctrine of "*expressio unius est exclusio alterius*" maintains that the enumeration of acts, things or persons as coming within the operation or exception of a statute will preclude the inclusion by implication of other acts, things or persons. (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403.) Thus, the explicit exception of activity expenses identified as the "type described in subdivision (c) of Section 82045" in section 86115(b) precludes any other exceptions to the qualification of $5,000 filers from section 82045 being read into the statute.

These sections must be read in harmony to give each one purpose, if possible. "'Repeals by implication are not favored, and are recognized only when there is no rational basis for harmonizing two potentially conflicting laws. [Citation omitted.] Furthermore, we must assume that when passing a statute the Legislature is aware of existing related laws and

intends to maintain a consistent body of rules.'" (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7, as quoted in *Consumers Union of United States, supra*.) In order to give meaning to both sections, section 86115 must be read to continue to qualify $5,000 filers under the criteria stated and, thereby create a filing obligation for those filers, and section 86116 must be read to require at least *some* reporting from those filers.

To harmonize and give effect to all provisions, section 86116(i) can be applied to the reporting of grass roots lobbying. Section 86116(i) states that periodic reports shall contain:

> "(i) Any other information required by the commission consistent with the purposes and provisions of this chapter."

One of the purposes of the Act is to regulate lobbying activities and the "manifest purpose of the financial disclosure provisions of the Act is to insure a better informed electorate and to prevent corruption of the political process." (*Thirteen Committee v. Weinreb* (1985) 168 Cal.App.3d 528, 532-533; section 81002(b).) The Act should be liberally construed to accomplish its purposes. (Section 81003.) Section 86116(i) could be applied to achieve the goal of disclosure of "grass roots" lobbying. If not, the PUC "grass roots" $5,000 filers would have no reporting obligations regarding the activities that qualified them as $5,000 filers in the first place. This lack of disclosure would not further regulation of lobbying activities, insure a better informed electorate or further the purposes of the Act.

Recommendation

Staff believes that the statutory authority exists to require "grass roots" lobbying activities relating to PUC proceedings be reported and recommends that the clarifying changes to regulation 18616 be incorporated. Subdivision (g)(5)(D) would be changed to exclude payments made for "grass roots" lobbying from the reduced reporting requirements for PUC proceedings so that "grass roots" PUC lobbying would continue to be reported. Additionally, a technical change would be made at 18616(g)(5) to remove the words, "on a separate schedule furnished by the Commission" since the amount is written on the same schedule as the other reporting numbers and not a separate schedule.

Attachment

Proposed Amendments to Regulation 18616